CITATION: Yunus v. Mohammed, 2020 ONSC Number
COURT FILE NO.: FS-19-00014238
DATE: 20200117

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ibrahim Yunus, Applicant

AND:

Nebila Mohammed, Respondent

BEFORE: E.L. Nakonechny, J.

COUNSEL: *James Marks*, for the Applicant

Matthew A. Giesinger, for the Respondent

HEARD: January 9, 2020

ENDORSEMENT

[1] This is an Application for a declaration that the Respondent is wrongfully retaining the parties' four children, M. born November 24, 2008 (aged 11), R. born May 26, 2010 (aged 9), H. born December 14, 2011 (aged 8), and U. born January 31, 2016 (almost aged 3) in Ontario and that the retention is a wrongful removal or retention of the children under Article 3 of the *Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, 1343 U.N.T.S. 89, Can. T.S. 1983 No. 35 (the "*Hague Convention*"). The Applicant seeks an Order for the return of the children to their habitual residence of Melbourne, Australia and other related relief.

[2] Article 3 of the Hague Convention provides that the removal or retention of a child is considered wrongful where it is in breach of a person's rights of custody under the law of the state where the child was habitually resident immediately before the removal or retention.

[3] The Respondent does not dispute that the Applicant has custodial rights to the children or that Melbourne, Australia was the habitual residence of the children at the material time. The Respondent argues under Article 13(a) of the *Hague Convention* that the Applicant consented or acquiesced to her removal of the children and under Article 13(b) that there is a grave risk of harm that returning the children would expose them to physical or psychological harm or otherwise place the children in an intolerable situation.

Background

[4] The Applicant father is 44 years old and an Australian citizen. The Applicant's mother, siblings and extended family live in Australia.

[5] The Respondent mother is 36 years old and a Canadian citizen. She has resided in Australia since 2007. She is an Australian Permanent Resident. The Respondent's mother, siblings and extended family live in Canada.

[6] The children were all born in Australian and have lived all of their lives in Australia. They attend school, mosque, and extracurricular activities with friends and family in Australia.

[7] In late 2018, the Respondent's mother, brother and aunt came to Australia to visit the family. The parties were already having difficulty in their relationship. The visit caused more stress and conflict in the parties' relationship.

[8] The Respondent stated that she wanted to travel to Canada with the children and spend two to three months with her family there to get away from the stress of the marital problems. The Applicant agreed to the overseas travel and signed applications to obtain Australian passports for the children.

[9] The night before the Respondent and the children were to leave, February 13, 2019, the parties had an argument. The Respondent states that the Applicant was angry and told her never to come back from Canada. The Applicant does not deny this, but states it was said in the heat of the argument and not meant seriously. The Applicant says he spoke to the Respondent by telephone and apologized before she left Australia. He told her to rest and come back relaxed.

[10] Once the Respondent and the children arrived in Canada, the Applicant had difficulty communicating with them by telephone. The Respondent did not return his messages. Beginning in March 2019, he was able to have video conversations with the children about once every three days. The parties communicated infrequently by WhatsApp messaging.

[11] On March 30, 2019, the Respondent told the Applicant not to book tickets for her and the children to return to Australia. On April 5, 2019 the Applicant e-mailed the Respondent reminding her that she promised she was only taking the children for a two to three-month holiday and would come back. He asked her to focus on the well-being of the children. The Respondent replied: "I don't think you understand. I have made a decision. It's final. I told my family already. My life in Australia is over."

[12] The Applicant filed a Hague Application with the Central Authority of Australia on May 17, 2019. The Application was submitted to the Central Authority of Ontario on June 4, 2019. There was some delay while the Applicant obtained legal aid funding in Australia for his Hague Application in Canada. He commenced this Application on December 6, 2019.

[13] The Applicant travelled to Canada on December 8, 2019. He contacted the Respondent to arrange in person access to the children. The Applicant saw the children for one hour on each of December 11 at a library and December 13 at a restaurant. The Respondent originally agreed the Applicant could have overnight access to the children the weekend of December 14 – 15. She then changed her mind and the access did not take place. The Applicant returned to Australia having had only limited access to the children.

[14] The Applicant currently has telephone access to the children about two days per week for about 15 minutes. He states he does not know where the children are attending school.

Analysis

[15] In *Ludwig v. Ludwig*, 2019 ONCA 680, the Court of Appeal set out the analytic framework the court should apply to a Hague Application. The first step is to determine the date of the alleged wrongful removal or retention and in which jurisdiction the child was habitually resident immediately before the alleged wrongful removal or retention. The second step is to determine if any of the exceptions in the *Hague Convention* apply. If no exception applies, Article 12 of the *Hague Convention* requires the court to order the return of the children to their country of habitual residence.

[16] The date of the wrongful retention was April 5, 2019 when the Respondent confirmed her final decision to retain the children in Canada against the Applicant's wishes. The parties agree that the children's habitual residence immediately before the alleged wrongful retention was Melbourne, Australia. The Applicant's Hague Application was filed in May 2019.

[17] In the second stage of the analysis, the court must determine if one of the exceptions in Article 13 applies to prevent the court from returning the children to their habitual residence. While Article 13 contains exceptions to the general rule that a wrongfully removed or retained child must be returned to his or her country of habitual residence, it should not be read so broadly that it erodes the general rule: *Balev v. Baggot*, 2018 SCC 16, paras. 75-76.

[18] The Respondent argues that I should decline to order the return of the children to Australia based on the exceptions in Article 13(a), acquiescence of the Applicant and 13(b), grave risk of harm.

Did the Applicant consent or acquiesce to the removal or retention of the children by the Respondent?

[19] Article 13(a) of the Hague Convention provides that the requested State is not bound to order the return of a child if the person who opposes the return establishes that the person seeking the return "consented or subsequently acquiesced in the removal or retention".

[20] The Respondent argues that on the night before she left for Canada the Applicant told her she was disabled and that she should never come back from Canada. She says she does not recall him subsequently apologizing or saying that he wanted her and the children to return to Australia until long after they arrived in Canada.

[21] The Respondent relies on a text message from the Applicant dated December 23, 2019 as evidence of his acquiesce to the move. His message reads, in part, as follows: "… I want to sit down with you and our kids for a few minutes. We owe it to ourselves and our kids to sit down together. Sit down face to face and discuss what is best for the kids. I'm willing to relocate if what is bothering you is to be far away from your family. …"

[22] In *Katsigiannis v. Kottick-Katsigiannis* (2001) CarswellOnt 2909, the Court of Appeal reviewed a number of authorities dealing with the consent/acquiescence provision of Article 13(a). At paragraph 38, the Court of Appeal referenced the interpretation of acquiescence accepted by the House of Lords in *H (Minors), Re* (1996), [1996] H.L.J. No. 43 (Eng. H.L.): "Acquiescence is a question of fact. It is usually to be inferred from conduct; but it may, of course, be evidenced by statements in clear and unambiguous terms to the relevant effect."

[23] At paragraph 43 of *Katsigiannis*, *supra,* the Court of Appeal cited *P. v. P. (Abduction: Consent or Acquiescence)*, [1997] 3 F.C.R. 550 (H.Ct.Fam. Div.), aff'd March 6, 1998 (C.A.) and agreed with the English Court of Appeal that although consent does not have to be evidenced in writing or expressly stated, it must "amount to clear and cogent evidence of an unequivocal consent."

[24] In my view, the fact that the Applicant agreed that the Respondent could bring the children to Canada to visit her family for two to three months cannot be interpreted as an agreement to allow the Respondent to change the children's habitual residence. In *Thompson v. Thompson*, [1994] 3 S.C.R. 551 the Supreme Court of Canada found that wrongful retention occurs in a situation of refusal to return a child after a trip abroad even where the original removal was with the consent of the parent exercising custodial rights. That is the case here.

[25] Similarly, the Applicant's statement to the Respondent that she should never come back from Canada, made in an argument and quickly retracted, does not amount to clear and cogent evidence of his unequivocal consent to move the children's habitual residence.

[26] The Applicant's offer of relocation in the text dated December 23, 2019, was made after the Hague Application and this Application were brought and after the Applicant had been separated from his children for 10 months. It was made in the context of a proposal for a discussion of the issues between the parties.

[27] In my opinion, the Respondent has failed to prove that the Applicant, by his words or conduct, consented or acquiesced to change the children's habitual residence from Australia to Canada.

Would the children be exposed to a grave risk of harm or be placed in an intolerable situation if they were returned to Australia?

[28] In *Thompson*, *supra*, the Supreme Court of Canada set out the high standard for the test of grave risk of harm:

> "In brief, although the word "grave" modifies "risk" and not "harm", this must be read in conjunction with the clause "or otherwise place the child in an intolerable situation." The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of Article 13(b) is harm to a degree that also amounts to an intolerable situation." at p.596.

[29] In *Jabbaz v. Moummar* (2003), 38 R.F.L. (5th) 103 at para. 23, the Ontario Court of Appeal set out the test for severity of harm as "an extreme situation; a situation that is unbearable; a situation too severe to be endured."

[30] The onus is on the Respondent to prove, on a balance of probabilities, that the children would be exposed to grave risk of harm or otherwise placed in an intolerable situation if returned to Australia. In *Hassan v. Garib*, 2017 ONSC 7227, para. 9, Engelking J. set out three questions the court should consider in determining if the threshold of grave risk of harm has been met:

1. Has the alleged past violence been severe and is it likely to recur?

2. Has it been life-threatening?

3. Does the record show that the father is not amenable to control by the justice system?

[31] The Respondent's evidence alleges that the Applicant was controlling, misogynistic and emotionally, financially and physically abusive to her during the marriage. She states that this behavior created stress which caused her to have panic attacks, suffer muscle pain and other health problems. She sought treatment from an osteopath, physiotherapist, acupuncturist and attended the gym regularly for relief.

[32] The Respondent states that the Applicant was vindictive and judgmental. He yelled at her and was rude and hostile to her family members. The Applicant was controlling about her housekeeping, pregnancies and care of the children. Once he slapped her. A few times he threw something at her (a cucumber, keys).

[33] The Respondent provided a letter and two e-mails exchanged between the parties in 2015. In these letters, the Respondent tells the Applicant his behavior is not appropriate and asks him to control his anger and make changes to his character. She says the parties must be considerate of one another and learn to communicate better. They must keep open minds and come together in agreement. In the letters, the Respondent acknowledges that the Applicant has good qualities and is good to her and the children.

[34] The Respondent disclosed the allegations of abuse to her doctor who referred her to a psychologist. The Respondent hid her meeting with the psychologist from the Applicant because she says he refused to allow her to access this treatment.

[35] The Respondent participated in therapy in 2016 and 2017. She learned how to deal with her anxiety and depression. She confided her allegations of abuse to her therapeutic professionals.

[36] Although it is not determinative, the Respondent provided no police or medical reports relating to her allegations of abuse by the Applicant or evidence of disclosure she says she made to third parties.

[37] I have reviewed the Respondent's evidence thoroughly. She has filed an Affidavit which contains many paragraphs detailing the troubles in the parties' relationship and the Applicant's alleged abusive behavior of the Applicant. I do not doubt that the Respondent was unhappy in her relationship with the Applicant.

[38] The only evidence the Respondent provides that directly relates to the children's situation in Australia is as follows:

a. The Applicant would not let the Respondent and the children sleep in the few hours before sunset. He would forcefully wake the children up even if they were tired;

b. When the children would yawn, he would strike their hands to admonish them;

c. The Applicant would frequently slap the children on the back of the head when they were young;

d. When the eldest child was eight or nine, the Applicant hit him violently as punishment for disrespecting a guest in their home;

e. The Applicant left the children at mosque and forgot to bring them home; and

f. The Applicant used the children as messengers between the parties.

[39] The Applicant denies that he ever struck the Respondent. He admits to throwing a slipper at her during an argument. He expresses regret for this action.

[40] The Applicant acknowledges that the parties argued. The Respondent states the Applicant demeaned her by ignoring her. The Applicant states he stayed away from her until the situation between them was calmer.

[41] The Applicant admits to physically disciplining the children when they were young with a light tap on their wrist or head. He states that he has not used this form of discipline for about three years. He denies any other form of physical discipline.

[42] The Respondent argues that I must examine the credibility and reliability of the evidence given by the parties to determine if she has discharged her onus of proof. She states that I should prefer her version of events over the Applicant's version of events. The Respondent argues that her Affidavit is replete with detail and clear evidence, especially as it relates to the abuse she and the children suffered at the hands of the Applicant. She states that the Applicant sought to paint a "rosy picture" of the family's life in Australia and only responded to the allegations of abuse when they were raised in her Affidavit.

[43] I am not persuaded by the Respondent's argument. Even if all of the allegations made by the Respondent against the Applicant were true, the incidents and behavior described would not meet the high standard of "grave risk of harm" or "a situation too severe to be endured": *Knight v. Gottesman*, 2019 ONSC 4341 paras. 84-86.

[44] Applying the three questions in *Hassan, supra*, the alleged past abuse has not been severe to the degree required to establish a grave risk of harm or an intolerable situation; it has not been life threatening; there is no evidence that the father is not amenable to control by the justice system. There is no evidence that the police, social services or any other protection agency has been involved with the family.

[45] I cannot conclude that the children would be exposed to a grave risk of harm or be placed in an intolerable situation within the meaning of the *Hague Convention* if they return to Australia. If the parties choose to end their marriage, Australia is well equipped to determine the issues of custody and access between the parties and to protect the children's welfare in accordance with its laws. The role of the court in a Hague Application is not a custody determination but to return the child to the jurisdiction where custody can be best determined: *Balev, supra*, at para. 24.

Order

[46] The children, M. born November 24, 2008, R. born May 26, 2010, H. born December 14, 2011, and U. born January 31, 2016 shall be returned to Melbourne, Australia in the care of the Applicant within 10 days of the date of this Order unless otherwise agreed in writing between the parties.

[47] The Applicant shall buy the airline tickets for the children and also for the Respondent should she choose to return to Australia.

[48] The Respondent shall provide the Applicant's counsel and/or the police forces with full particulars of the whereabouts of the children and copies of all records pertaining to the children pursuant to s. 39 of the *Children's Law Reform Act.*

[49] The Applicant's counsel shall deliver to the Applicant the originals of all the children's passports, original birth certificates, identity cards and any other identification for the children received by him pursuant to the Order of Nakonechny, J., dated January 9, 2020.

[50] The Toronto Police, the Ontario Provincial Police, the Royal Canadian Mounted Police, the Canada Border Services Agency, and any other police division in Ontario are directed and authorized to enforce this Order, if requested. In doing so, they may enter any place, including a dwelling place, if they have reasonable and probable grounds to believe the children are located, seize the children's passports, birth certificates and any other identification or records pertaining to the children and deliver them to the Applicant's counsel.

[51] The Respondent shall not apply for any passports for the children.

[52] Neither party shall remove the children from Melbourne, Australia until the family court of Australia or the court with competent jurisdiction determines the merits of a claim for custody or access under its law, by interim or final parenting orders, or as the parties otherwise agree in writing.

[53] If the parties are unable to reach an agreement on costs, the Applicant shall serve and file written costs submissions no longer than three pages, not including offers to settle and bills of costs no later than seven business days from the release of these reasons. The Respondent shall serve and file any responding materials within seven business days of receipt of the Applicant's material, subject to the same length restrictions. The Applicant may file reply submissions two pages in length seven days thereafter.

E.L. Nakonechny

Date: January 17, 2020